FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** VFV

DATE: **October 7, 2024**

SUBJECT: **AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Hogan for Maryland Comment on Draft A**

Attached is AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Hogan for Maryland Comment on Draft A. This matter is on the October 10, 2024 Open meeting.

Attachment

ASHBY

October 7, 2024

VIA EMAIL

Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington, DC 20463

Re: Advisory Opinion Request 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona)

Dear Commissioners:

Hogan for Maryland Inc. ("HFM"), by and through its counsel, respectfully submits this comment to the Federal Election Commission (the "FEC" or "Commission") for consideration of Advisory Opinion Request 2024-13 (the "AOR") submitted by the DSCC, Montanans for Tester, and Gallego for Arizona (the "Requestors"). The AOR seeks the Commission's opinion on how two proposed Joint Fundraising Committees ("JFC") and their participating committees would allocate the costs of fundraising expenses for television advertisement solicitations. The AOR also asks whether the JFC advertisements must include the fundraising notice required by 11 C.F.R. § 102.17(c)(2).

HFM urges the Commission to adopt the conclusions and analysis in Draft A. Specifically, the Commission should answer yes to Question 1 and no to Question 3. As Draft A notes, a yes to Question 1 eliminates any need to answer Question 2 and so HFM does not specifically address it.

Introduction

Joint fundraising has been a feature of federal election political activity for decades. Congress's 1976 amendments to the Federal Election Campaign Act of 1971 ("FECA" or the "Act") allowed for joint fundraising but otherwise offered no specifics.[1] After years of issuing Advisory Opinions outlining JFC requirements, the Commission addressed the lack of guidance in 1983 by promulgating 11 C.F.R. § 102.17.[2] The Commission has left the regulation largely unchanged since then, an indication it has sufficiently governed joint fundraising activities.

The AOR purports to seek the Commission's advice on how to allocate costs for JFC television ads, but in reality it is a clumsy ploy to persuade the Commission to effectively prohibit them or deem them Hybrid Ads. The implications would certainly extend to virtually all types of JFC

[1] Federal Election Campaign Act Amendments of 1976, 94 H.R. 12406, Sec. 320(a)(5) (1976).

[2] Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,296 (June 7, 1983).

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fundraising communications. In "seeking approval" for its proposed communications, the AOR argues the Commission should, instead of sticking to the actual joint fundraising regulation, apply regulations that are completely inapposite. Requestors also make the ridiculous suggestion that JFC advertisements must display the detailed fundraising notice outlined in 11 C.F.R. § 102.17(c)(2) (the "Notice"). Doing so would transform the Notice into perhaps the lengthiest and most onerous disclaimer in all of state or federal campaign finance law.

Following the AOR's suggested approach for both questions would raise significant constitutional concerns under the First Amendment. Answering no to Question 1 and yes to Question 2 would require the Commission to parse out interwoven fundraising and political speech elements within a communication, which the Supreme Court has determined is untenable. Question 3 would impose a type of onerous disclaimer requirement that serves little use and would be difficult to defend under exacting scrutiny. Engaging in the line drawing exercise the AOR demands would put both the Commission and JFC participants in a precarious and impossible position, as would requiring JFCs to display the Notice during the advertisements. Fortunately, as Draft A shows, Commission regulations and precedent provide a clear roadmap to avoid these results.

1. JFC Ad Costs Should be Allocated According to 11 C.F.R. § 102.17's Requirements

The Commission should answer yes to Question 1 because the relevant joint fundraising regulation requires participants to "share . . . expenses based on the percentage of the total receipts each participant had been allocated."[3] Imposing a time/space cost allocation would improperly depart from the Commission's regulatory commands and require the Commission to engage in an impossible, fraught with First Amendment hurdles, task of dissecting what components of a communication entail fundraising and which do not.

A. The First Amendment Requires the Commission to Avoid Dissecting and Classifying Individual Components of JFC Communications

It is imperative to recognize that it would be difficult, if not impossible, to draw bright lines on whether a JFC advertisement is made "for the dual purpose of soliciting for the committee and advocating for a candidate" or to dissect and categorize messaging components within a specific communication.[4] Although here, the AOR publicly stated the Requestors' intent, it would be speculative to assume that JFC advertisements referencing candidates or that contain political messaging are all made with "dual purposes."[5] The Commission should decline the Requestors' invitation for it to divine the intent of the advertiser.

[3] 11 C.F.R. § 102.17(c)(7)(i)(A).

[4] AOR 2014-13 (DSCC, Montanans for Tester, and Gallego for Arizona) at 5.

[5] Requestors' counsel should think twice before dragging the Commission into the business of regulating based upon a subjective determination of political advertisers' intent, lest they open up for examination the truthfulness of certain independent expenditure reports filed by others of their clients — reports that disclosed spending purportedly in opposition to certain Republican primary candidates, when everyone knows they intended to boost those candidates' electoral prospects.

Courts refuse to engage in this type of subjective line drawing exercise Requestors propose, given the sensitive First Amendment implications. The Commission should take note. "Where . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988). Even if courts could do so, "[s]olicitation of campaign funds . . . is close to the core of protected speech, as it is 'characteristically intertwined' with both information and advocacy and essential to the continued flow of both." *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995) (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). The Commission should resist Requestors' proposed framework that disregards the reality that JFC solicitations will inevitably intertwine political messaging and specific fundraising appeals.

Anyone who has received a fundraising solicitation understands this. JFC communications delivered orally or through email, text messaging, the internet, mass direct mail, or individualized letters to major donors are all likely to contain messaging components one could interpret as "advocating for a candidate" or a political party, including a candidate participating in the JFC. But the "purpose" for including that content may simply be because it is an effective fundraising method.

Depending on the strategy, fundraising communications may directly solicit funds up front or begin with messaging that motivates prospective donors to respond to a direct appeal towards the end of the communication. Some may interweave direct appeals throughout the message. To date, Hogan Victory Fund, the JFC in which HFM participates, has opted to display a specific fundraising solicitation for nearly the entirety of its advertisements, but other JFCs may find other strategies to be more appealing.

There are objective technical complications as well. How would time/space allocation apply to an advertisement that simultaneously displays a direct solicitation with audio articulating a more overt political message? Is the Commission to devise some complicated algorithm to determine the allocation? The time/space allocation is clearly unworkable and would also prevent experimentation with different strategies, rendering a JFC completely ineffective in its raison d'être of raising money for its participants.

Therefore, as a guiding principle, the Commission should, as the Supreme Court has in similar contexts, refuse to adopt a hyper-technical approach to evaluating and classifying the content of joint fundraising messaging because doing so would raise significant First Amendment concerns and be an exercise in futility.

B. Section 102.17 Provides the Exclusive Method for Allocating JFC Ad Costs

Neither the Act nor FEC regulations require the Commission to engage in the tortured dissection of JFC fundraising communications resulting from answering no to Question 1 and yes to Question 2. On the contrary, the applicable JFC regulation is unequivocal in requiring a JFC to "calculate each participant's share of expenses based on the percentage of the total receipts each participant

had been allocated."[6] With limited exceptions not relevant here, no other Commission regulations permit JFCs to allocate their expenses any other way.[7]

Notwithstanding 11 C.F.R. § 102.17's clear cost allocation requirement, the AOR points to "guiding principles" that Requestors seem to argue necessitate "dividing the costs of television advertising . . . on a time/space basis."[8] They point to 11 C.F.R. § 106.1(a)(1) that, at first glance, requires determining the allocation of costs "by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates."[9] But even subsection (a)(1) makes an exception for fundraising activities. The AOR ignores the very next sentence in the subsection that specifically addresses "a fundraising program or event where funds are collected" and, consistent with § 102.17, requires the "attribution" of costs to be in "the proportion of funds received by each candidate as compared to the total receipts by all candidates."[10]

Section 106.1's time/space allocation is inapplicable for another obvious reason. It only pertains to an expenditure that "identifie[s] more than one clearly identified Federal candidate."[11] Yes, the Commission has applied the regulation's time/space allocation method in other instances, but not when another regulation directly articulated a required allocation method. For example, the Commission adopted the time/space framework of 11 C.F.R. § 106.1 when approving the use of direct mail that contained both generic party and specific candidate references (a.k.a. "Hybrid Ads"). However, it only did so because "[n]either the Act nor Commission regulations definitively address the appropriate allocation of payments" for the proposed communications.[12] Here, 11 C.F.R. § 102.17's specific cost allocation requirement for JFCs controls over 11 C.F.R. § 106.1's, which does not apply to JFCs nor does it even provide for a time/space allocation method for fundraising activities.

JFCs fundraising through public communications, including television advertisements, is not a new concept nor is the formula for allocating fundraising costs.[13] And as other commenters have noted, the Commission has already concluded on multiple occasions that these communications would not trigger the "payment" prong of the coordinated communications regulations because, *inter alia*, each JFC participant "pay[s] the full cost of the public communications attributable to" it.[14]

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[6] 11 C.F.R. § 102.17(c)(7)(i)(a).

[7] 102.17(b)(3) and (c)(7) provide limited exceptions to this rule for JFC participants that are affiliated committees or when one participant covers expenses for another within the contribution limits. Also, § 102.17 makes no distinction between the types of fundraising communications and how JFCs allocate their costs, nor does anything in the Act or Commission's regulations dictate the mediums by which a JFC can fundraise.

[8] AOR at 5.

[9] 11 C.F.R. § 106.1(a)(1).

[10] *Id.*

[11] *Id.*

[12] Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 3. AO 2006-11 also cites to § 106.8 as a basis for time/space allocation; however, that regulation only applies to a "communication [that] does not solicit a contribution, donation, or any other funds from any person[.]" 11 C.F.R. § 106.8(a)(4).

[13] *See e.g.*, Advisory Opinion 2007-24 (Burkee/Walz) at 7.

[14] Advisory Opinion 2004-07 (Team Graham) at 7.

Finally, utilizing a time/space allocation would not only ignore 11 C.F.R. 102.17's required allocation method, it would also be a significant departure from and call into question other Commission regulations addressing allocating fundraising costs which, by default, utilize a cost allocation method based on the amount of funds raised.[15]

2. Section 102.17(c)(2) Does Not Require Displaying a Fundraising Notice During a Television Advertisement

The Commission should adopt Draft A and answer no to Question 3. A JFC does not need to include an on screen Notice during a JFC television advertisement, provided the Notice appears on a landing webpage or other form a donor must view in order to complete any contribution to the JFC. Any other result frustrates the purposes of the Notice requirement and wades into unnecessary First Amendment waters.

Requiring a JFC to display the Notice during the advertisement thwarts the purpose of 11 C.F.R. § 102.17(c)(2), which is to inform and educate contributors about giving to a JFC. It is also completely impracticable, duplicative with 11 C.F.R. § 110.11's disclaimer requirements, and furthers no legitimate governmental interests for requiring disclaimers or disclosures, needlessly raising First Amendment concerns.

Other than allowing for it, the Act itself provides no specific instructions for joint fundraising, including anything like the Notice required by 11 C.F.R. § 102.17(c)(2).[16] In its 1983 rulemaking explanation and justification, the Commission did briefly explain that the purpose of requiring the Notice was to "inform[] *contributors* of specific details of the fundraising activity."[17] Subsection (c)(2)'s text, which has remained virtually unchanged since its inception, supports this understanding. The Notice must include "[a] statement *informing contributors* that notwithstanding the stated allocation formula, they may designate their contributions for a particular participant or participants," and "[a] statement *informing contributors* that the allocation formula may change if a contributor makes a contribution which would exceed the amount that contributor may give to any participant."[18]

This makes sense. Unlike a straightforward contribution to a candidate or party committee, donors may be uncertain about giving to an unfamiliar committee type comprised of other committees, and that would have been especially true in 1983 when JFCs were relatively new. The Notice

[15] *See e.g.*, 11 C.F.R. § 106.6(d) (committees raising "federal and non-federal funds . . . through a joint activity . . . shall allocate its direct costs of fundraising . . . according to the funds received method."); and 11 C.F.R. § 106.7(d)(4) (when collecting both federal and non-federal funds "State, district, or local party committee . . . must allocate its direct fundraising costs . . . based on the ratio of funds received into its Federal account . . . .").

[16] The Act references joint fundraising activities in 52 U.S.C. § 30102(e)(3)(ii) (permitting candidates to designate a JFC as an authorized committee) and § 30116(a)(5) (clarifying that contribution limits do not limit "transfers between committees of funds raised through joint fund raising efforts[.]").

[17] Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,299 (June 7, 1983) (emphasis added).

[18] 11 C.F.R. § 102.17(c)(2)(i)(C) and (D) (emphases added).

ensures donors know the identity of the committees they would be contributing to through the JFC and in what amounts. It also helps inform donors about any relevant limitations or restrictions (in place now or in 1983) in contributing to the JFC or any of its participants. For example, a contribution could have exceeded the aggregate contribution limits in place at the time or the limits to participant committees. The Notice also assures donors they can allocate their contribution among the participating committees according to their choosing. In sum, it helps inform them about their options and where their money ultimately ends up.

But requiring the Notice in an ephemeral television advertisement does little to "inform[] the contributor."[19] The Notice provisions result in an incredibly lengthy disclaimer and political television ads typically run for only 30 or 60 seconds. For example, the Harris Victory Fund JFC's Notice is approximately 254 words and 1,444 characters with spaces.[20] Hogan Victory Fund's Notice takes up an entire letter-sized page. It is impossible to display this Notice large and long enough in a standard length ad to allow a contributor to comprehend it, while also simultaneously complying with 11 C.F.R. § 110.11's disclaimer requirements.

Answering yes to Question 3 would also have significant consequences for the JFC and its participating committees, so much so that it would raise serious constitutional concerns. Disclaimer requirements like the Notice are "subjected . . . to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) (cleaned up). They are "justified based on a governmental interest in providing the electorate with information about the sources of election-related spending" and to "help citizens make informed choices in the political marketplace." *Id.* (cleaned up).

There is no "substantial relation" between requiring the lengthy Notice to display throughout the entirety of a television ad and "a sufficiently important government interest," especially when no one can contribute directly through the advertisement itself. *Id.* The stated interest is to inform contributors about the "specific details of the fundraising activity," not necessarily the public at large.[21] The goal of informing the electorate is already accomplished by displaying the required disclaimers in 11 C.F.R. § 110.11. The Commission does not accomplish the goal of informing contributors by displaying the Notice in a time-limited environment where the Notice disappears upon completion of the ad. It *is* furthered by having the would-be donor scan the QR code and visit a webpage where the person has time to review and digest the Notice's detailed contents, and the public, like any donor, would still be free to scan the QR code and review the Notice.

No one would suggest that JFCs bypass the Notice requirement altogether and there is an obvious practical approach. The regulation requires a Notice to be "included with every solicitation for contributions."[22] The Commission should interpret "solicitation for contributions" to include the website one must visit in order to actually contribute. That will ensure any and all contributors

[19] 48 Fed. Reg. 26,299.
[20] Available at https://secure.actblue.com/donate/kamalaharris1 (last accessed October 7, 2024).
[21] 48 Fed. Reg. 26,299.
[22] 11 C.F.R. § 102.17(c)(2).

have the time to review and understand the Notice information and ensure they are fully aware of the specifics before making the contribution.

There are certainly precedents and analogues from which the Commission can draw, including the "impracticability" exception in 11 C.F.R. § 110.11(f) and its recent Internet Communications Disclaimer rulemaking, which permits the use of adaptive disclaimers when a traditional disclaimer "cannot be provided or would occupy more than 25 percent of the communication due to character or space constraints . . . ."[23] When adopting those rules, the Commission noted it allowed for adaptive disclaimers "based on long-standing Commission precedent where the Commission allowed communications to include modified disclaimers due to the technological or physical limitations of the communication medium."[24] Displaying the lengthy Notice in a television advertisement would seem to readily qualify as a "technological or physical limitation," and the Commission should draw from this precedent by interpreting the regulation in a reasonable manner.

Conclusion

The Commission should adopt Draft A and answer yes to Question 1 based on its longstanding JFC cost allocation requirements in 11 C.F.R. § 102.17 and no to Question 3 based on Commission precedent and regulations. There is no need to complicate the response as the Requestors suggest in a way that would raise serious First Amendment questions. Hogan for Maryland thanks the Commissioners for their thoughtful consideration of this comment and the AOR.

Sincerely,

J. Justin Riemer
Counsel to Hogan for Maryland Inc.

[23] 11 C.F.R. § 110.11(g)(2).
[24] Internet Communication Disclaimers and Definition of "Public Communication," Fed. Reg. 77,477 (Dec. 19, 2022).